No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation),
Plaintiff in Error,

vs.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,
Attorney for Plaintiff in Error.

Filed this Filed *day of October, 1914.*

OCT 5 - 1914

FRANK D. MONCKTON, Clerk.

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Clerk.

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BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought to recover damages for personal injuries. At the time complained of, March 9th, 1909, the defendant corporation was engaged in the business of mining and operating a quartz mine situate in the County of Shasta, State of California.

The plaintiff and his twin brother, Frank Whitsett, were employed by the defendant to operate a Burleigh drill in its mine. Frank was an experi-

enced miner and was known as a machine man (Record, pp. 56, 74, 75). Plaintiff was a machine man's helper, or chuck tender (Record, p. 65) and had worked for the defendant as a miner during a period of six weeks prior to the accident (Record, p. 68). The Burleigh drill is a machine operated by compressed air that drills holes in rock or ore preparatory to blasting. The machine man operated the valve that let the compressed air into the machine and by means of a screw, turned by a crank, kept the point of the drill in contact with the rock or ore (Record, pp. 49 and 70). The chuck tender was required to take a drill out of the chuck whenever necessary and put in another, and it was also his duty to pour water into the hole made by the drill while it was in operation (Record, pp. 49 and 71). These two brothers changed about in their work from time to time, so that they alternately worked as drill man and chuck tender (Record, pp. 49 and 70). At the time of the accident plaintiff was operating the drill and Frank was the chuck tender (Record, p. 66). Ordinarily, a round of a dozen holes was drilled, four at the top, four in the middle and four at the bottom of the face of the drift or cross-cut, the bottom four being called lifters (Record, p. 68). When the drilling was completed the holes were filled with dynamite, and there was a cap and fuse for each hole. As the men went off shift, the fuses were lighted, and by the time the men had reached places of safety, the explosion took place, blasting the rock out roughly

in the shape of the drift or cross-cut (Record, p. 68). After a blast a man came with an iron or steel bar and loosened all of the rock that had not completely fallen away from the face of the drift or cross-cut, so that the same could be shoveled up by the muckers. This was called "barring down". The man employed for this work in the shift in which the Whitsett brothers worked, was named Yokum. It was also his duty to examine the face of the drift or cross-cut as far down as the accumulation of muck at the bottom of the same would permit, for the purpose of discovering or detecting missed-shots (Record, pp. 98, 78 and 79). It was not his duty to examine below the pile of muck for missed-shots (Record, pp. 78, 79, 98). Defendant contended that the duty of examining the lower part of the face rested upon the miners—particularly the machine men—after the removal of the muck (Record, pp. 75 and 76). The muckers, or laborers, removed the muck or broken rock after each blast (Record, p. 76). The operation of clearing the muck from any one place required a shift, and sometimes more than a shift, so that a round of holes blasted at the end of one shift might not be cleared away by the end of the following shift (Record, p. 78). A month or more prior to the accident a drift or tunnel had been cut in the mine, and from this drift or tunnel a cross-cut was being made by the Whitsett brothers and their opposite shift at the time of the accident (Record, p. 77). In the face of the cross-cut one round of holes had been drilled and blasted, break-

ing the rock out to a depth of three or three and one-half feet. This first blast had taken place some time before the Whitsett brothers went to work at the cross-cut (Record, pp. 74 and 76), and they were, therefore, engaged in drilling the second round of holes at the time of the accident (Record, p. 94). The first work that the Whitsett brothers did at this place was on the night preceding the accident, when they drilled five holes. They then went off shift and in due time the day shift came on work,—the defendant worked but two shifts in its mine. The drilling was continued by the day shift, so that when the Whitsett brothers went to work on the night shift following, there were but two holes and a part of a third yet to drill. These were the lifters (Record, p. 68). The Whitsett brothers began work on the uncompleted hole, and as they were drilling the same, the drill struck and exploded a missed-shot, or missed-hole, that is to say, a charge of dynamite that had not been exploded in the preceding blast. In this explosion Frank was killed and Fred was much injured. This action, as has been stated, is brought to recover damages for the personal injuries sustained by Fred. The administrator of the estate of Frank maintains his separate action to recover damages for the death (see Record on Appeal in Case No. 2420 before this Court).

The amended complaint charges the defendant with negligence in failing to exercise ordinary care to provide a safe, suitable and proper place for

plaintiff to perform his labor, and also with negligence in failing to provide a careful and competent man "to locate, mark and report to the oncoming shift unexploded charges of powder, and determine the safety of the place they were to work in", and that plaintiff's injury was caused by the negligence of said missed-shot detective.

The original complaint, filed March 8th, 1910, alleged that plaintiff was injured through the negligence of the defendant in failing to provide and maintain for him a safe, suitable and proper place in which he could perform his labor. It contained no reference to the missed-hole man, and did not allege that the accident and injury complained of was due to the carelessness of an incompetent fellow employe (Record, p. 2).

In its answer defendant admits the accident and injury, but denies the negligence, and denies that it could have discovered and known of the missed-shot; and as a separate and further defense the defendant alleges that any cause of action set forth in the amended complaint "based on the alleged failure and neglect of this defendant to provide a careful and competent missed-hole man was not pleaded or alleged until the filing of plaintiff's amended complaint herein, more than a year after the accident and injury complained of, and that as to said cause of action, the same is barred by the provisions of Section 340 of the Code of Civil Procedure" (Record, p. 38).

The case was joined with that of J. E. Reardon, Administrator of the Estate of Frank Whitsett, deceased, for trial, both cases being tried before the same jury. This case resulted in a verdict in favor of the plaintiff and against the defendant in the sum of five thousand dollars. Separate motions for new trial were duly made and denied, and separate writs of error to the Court below were duly obtained, and both cases are now before this Court on writs of error. In the Court below the main issue was whether or not the accident was proximately caused by any negligence on the part of the defendant, plaintiff contending that it was the duty of the defendant to exercise ordinary care to discover the missed-shot, while the latter insisted that under the circumstances, there was no duty on its part to furnish deceased with a safe place in which to work, and that it could properly delegate to Yokum and to Frank Whitsett and to the plaintiff the duty of looking for and detecting the missed-shot. Furthermore, defendant contended that the missed-shot in this instance was so concealed that it was impossible by any ordinary or practicable method to discover the same.

Before this Court the plaintiff in error relies on the following

SPECIFICATIONS OF ERROR,

which are urged by it as grounds for the reversal of the judgment of the District Court:

I.

That the District Court erred in permitting counsel for the plaintiff to state, in the presence of the jury: "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the Court, constituting the First Assignment of Error (Record, pp. 148, 149).

II.

That on May 15th, 1912, and while the jury was being empaneled in the above entitled action during the examination of N. S. Arnold, a talesman on his *voir dire* by counsel for plaintiff, the following proceedings were had:

> "Mr. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with an indemnity company or organization for the purpose of insuring people against personal injuries?
>
> Mr. WILSON. I object to that question as immaterial.
>
> Mr. CANNON. I do not think it is immaterial. I would like to state why I ask the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of action and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON. We now move the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendant's counsel, constituting the Second Assignment of Error (Record, pp. 149, 150).

III.

The following question was then propounded to said N. S. Arnold, a talesman, on his *voir dire:*

"Mr. CANNON. Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury

notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance, constituting the Third Assignment of Error (Record, p. 150).

IV.

That after the jury was sworn to try the above entitled cause and before testimony was introduced in said cause, defendant, by its counsel, moved the Court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint, to wit: One cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and the second in the same count on the theory that defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action and each of them being separate delicts. That said motion, when made, was denied by the Court.

That said defendant then and there excepted to said denial of said motion, and that the ruling of the Court thereon constitutes the Fourth Assignment of Error (Record, p. 151).

V.

That the part of the amended complaint of plaintiff wherein he pretends to set forth a cause of action based on the alleged failure and neglect of

the defendant to provide a careful and competent missed-hole man, was not pleaded or alleged until the filing of plaintiff's amended complaint herein, more than one year after the accident and injury complained of, and that as to such cause of action, the same is barred by the provisions of Section 340 of the Code of Civil Procedure.

VI.

That thereupon defendant made its motion to strike out all of the testimony in this case as to the competency of the man Yokum, and all of the testimony in the case as to his being intoxicated, or seen intoxicated, on the ground that it is not shown that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift—cross-cut—was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or incompetency or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit, or ever at any time overlooked a missed-hole, and on the ground that it does not appear that Yokum had had anything to do with the work of inspecting the drift or face in which the accident occurred, and that it was not shown that a missed-shot had exploded, which caused the accident and injury complained of.

That the Court denied said motion to strike out the evidence relating to said Yokum and as to his intoxication and incompetency, to which ruling the defendant then and there excepted.

That the Court erred in denying said motion, constituting Error No. twenty-six (Record, pp. 161, 162).

VII.

That thereupon defendant made its motion for a nonsuit, as follows:

> "And in the Fred Whitsett case we make the further motion that an order of nonsuit be made and entered therein upon the ground, first, that the plaintiff has wholly failed and neglected to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; second, upon the ground that there is no evidence in this case that the missed-shot man or the man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew, or had reason to know of his habits of intoxication; nor is there any evidence to show that at the time of the accident and injury complained of, or immediately before that time, Yokum inspected the place where the accident occurred and at that time was under the influence of liquor or inefficient in any way or manner, whatsoever; and on the third ground that there is no evidence in this case to show that by any act or omission on the part of the defendant the plaintiff was furnished with an unsafe place in which to work."

That said motion was then denied, and the defendant then and there excepted thereto.

That the Court erred in denying said motion, constituting Error No. twenty-seven (Record, pp. 162, 163).

VIII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant):

> "You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the defendant."

Which request was refused, to which ruling the defendant then and there excepted.

That the Court erred in refusing to give such instruction, constituting the fortieth Assignment of Error (Record, pp. 169, 170).

IX.

That the District Court erred in overruling and denying the petition of defendant for a new trial herein, to which ruling the defendant duly excepted.

That the Court erred in denying said petition for a new trial, constituting the fifty-fifth Assignment of Error (Record, p. 182).

X.

Prior to the argument to the jury the defendant duly requested in writing that the Court should

give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant):

> "I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the forty-fourth Assignment of Error (Record, p. 172).

XI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant):

> "It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you

that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the forty-fifth Assignment of Error (Record, p. 173).

XII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant):

"If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident oc-

curred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, constituting the forty-eighth Assignment of Error (Record, pp. 175, 176, 177).

XIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same

being numbered 31 of the instructions requested by the defendant):

> "If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, the error of the Court in refusing to so charge the jury constituting the forty-ninth Assignment of Error (Record, pp. 177, 178).

XIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant):

> "If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine, where he was engaged to labor, and if you further find that the accident complained of

was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, the error of the District Court in refusing to so charge the jury constituting the fiftieth Assignment of Error (Record, pp. 178, 179).

XV.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

"In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it

> was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law.

That the error of the District Court in so charging the jury now constitutes the fifty-first Assignment of Error (Record, pp. 179, 180).

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

These specifications of error pertaining to the alleged misconduct of counsel for plaintiff in stating in the presence of the jury that this action is defended by an insurance company, may be considered together.

The record shows that during the examination by Mr. Cannon of N. S. Arnold, a talesman, on his *voir dire,* and who subsequently sat as a juror in this cause, the following proceedings were had:

> "Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?
>
> Mr. WILSON. I object to that question as immaterial.

Mr. CANNON. I do not think that it is immaterial. I would like to state why I asked the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire——

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT. I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON. We insist on the error.

The COURT. You have your right to reserve your exception. I overrule your objection.

Which ruling defendant now assigns as

Error No. 1.

Mr. WILSON. We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as

Error No. 2.

Mr. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. Wilson. We insist upon our objection.

The Court. I overrule the objection.

Mr. Wilson. I will take an exception.

The Court. They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. Wilson. The Supreme Court of this State has decided otherwise.

The Court. The objection is overruled.

Which ruling defendant now assigns as Error No. 3."

(Record, pp. 44-46.)

Reduced to a simple proposition, the objection is that Mr. Cannon stated, in the presence of the jury that heard and determined this case, that the defendant was indemnified by insurance and that the insurance company was defending the case through its own counsel. These facts could not have been proved by him in the course of the trial, and it was misconduct for him to inform the jury of them. The Court, instead of then and there instructing the jury to disregard these matters, stated that it would develop the facts and that it would instruct the jury to pay no attention to the same, unless they should appear as pertinent facts.

No evidence was introduced on the subject and it did not appear in the evidence or otherwise, except through the statements complained of, that the defendant is insured and that the insurance company is defending this case. The facts were

not made to appear pertinent. Notwithstanding, the Court, overlooking its promise, wholly failed and neglected to instruct the jury relative to the matter. Defendant's counsel, of course, had a right to rely upon the promise of the Court in that particular, and the obvious misconduct of counsel, coupled with the neglect of the Court, prejudiced the defendant to the extent that its demands for a new trial must be granted.

It is reversible error for counsel to bring to the attention of the jury, at any time or in any manner, the fact that the defendant is insured as against the accident sued on, and in that connection, I beg to refer to the case of

Eckhart etc. Co. v. Schaeffer, 101 Ill. App. 500.

In that case, in the examination of the jury, one of the veniremen was asked if he was connected with the Fidelity and Casualty Company, and thereupon plaintiff's counsel said: "I may state, gentlemen, that the Fidelity and Casualty Company are defending this case." On the examination of another juryman, a similar statement was made by counsel for plaintiff, and then addressing counsel for defendant: "You are the attorney for the Fidelity and Casualty Company, are you not?" And, after objection: "I mean in this particular case he is the attorney for the Fidelity and Casualty Company." And again: "Mr. Dynes, isn't it a fact that the Fidelity and Casualty Company will pay any judgment rendered in this

case?" And again: "Do you know Mr. Dynes here, who sits here, the attorney for the Fidelity and Casualty Company?" And again: "Now, this case is defended by the Fidelity and Casualty Company." And again: "Do you know their attorney here, Mr. Dynes or Mr. Williams?" The Court in its opinion, says:

> "It sufficiently appears from the foregoing that the attorneys for the plaintiff (appellee here), not satisfied with asking jurors whether they knew any one connected with the Fidelity and Casualty Company, which question they had the right to ask, for the purpose of a peremptory challenge, and which was not objected to, proceeded further, and stated to the jurors that the Fidelity and Casualty Company was defending the case, and also stated that Mr. Dynes, who is appellant's attorney, was the attorney of the Fidelity and Casualty Company in this case in the trial court. And the court, by overruling the objections of appellant's attorneys to such statements, stamped the statement with the court's approval, so that they went to the jury with all the force and effect of evidence. Mr. Dynes was the attorney of record for appellant and the Fidelity and Casualty Company was not a party to the record. If it were a fact that the Fidelity and Casualty Company was defending the suit, it would not be competent to prove that fact, for the plain reason that such proof would not tend, in any degree, to sustain the issues; it would be totally irrelevant. It is, therefore, plain that the attorneys, presumably learned in the law, could not have made the statements in question for any legitimate purpose, and while we will not say that they were made for an illegitimate purpose, and

to prejudice the jury, we are of opinion that they were well calculated to have that effect."

And a judgment for the plaintiff was reversed.

The case of

Fuller v. Darragh, 101 Ill. App. 664,

is a similar case. Misconduct was charged against the plaintiff's counsel in telling the jury, at the time of their examination *voir dire,* that he understood that an insurance company was defending the case. And the Court in its opinion, says:

To the proper conduct of jury trials one thing is absolutely essential, viz., a recognition of the principle that at the bar of justice all men are equal.

"All causes are to be tried; all questions determined upon matters pertinent thereto, and not upon considerations which in the controversy ought not to be mentioned.

"If verdicts are to be rendered or judgments to be given for plaintiffs because they are popular, or their manner of living, business, lineage, association or benevolence commends them to the community, or against defendants for the reason that they hold opinions, advocate ideas or engage in enterprises distasteful to many, then is our whole system of jurisprudence a mockery and a delusion.

"None of the learned counsel for appellee will gravely contend that whether appellant had procured insurance against liability for accidents, or whether the suit under consideration was being defended by an insurance

company or its attorney, could possibly throw any light upon the question of whether the injury to appellee had been occasioned by actionable negligence of appellant.

"Why, then, should the jury be told that the defense was made by a casualty insurance company? If this can be done, why may not a jury be told that the action is prosecuted by a corporation created to hunt up and prosecute accident cases, or by an attorney for a contingent fee; and that one-half of any verdict rendered for the plaintiff will go to such corporation or to his attorney?

"It is urged that this statement was made for the purpose of selecting a disinterested jury.

"Jurors may be asked if they know certain persons or have business or other relations with them, but under the guise of obtaining a fair jury, information calculated to prejudice jurors against either party cannot be given, and the trial court should not only prevent this, but if satisfied that despite its rulings jurors have thus been swerved in the considerations, should set aside verdicts so obtained.

"If a plaintiff, so unfortunate as to have had a father convicted of horse stealing and a mother of child stealing, comes into court asking that there be rendered to him what he believes to be his due, jurors cannot be asked if they know his father, lately sentenced for larceny, or his mother, in the penitentiary for a most heinous offense.

"Counsel had no right to tell the jury that he understood that an insurance company was defending the case."

The case of

Lipschutz v. Ross, 84 N. Y. Supp. 632,

is of the same character. It is said in the opinion in that case:

> "The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff by being struck by a vehicle and horse which were owned by defendant and driven by defendant's employee. The cause came on for trial before one of the justices of the City Court. Twelve talesmen were called to act as jurors in the case, and, after taking their seats in the jury box, and while being examined by counsel for the plaintiff for the purpose of ascertaining whether or not they were acceptable, plaintiff's counsel asked whether any of the jury were interested in the Travelers' Insurance Company of Hartford, Conn. This was objected to, and the objection was overruled. One of the jurymen then stated that he, as an agent of that insurance company, had sold insurance policies. Thereupon, in the presence and hearing of the jurors statements were made by the court and counsel, and exceptions taken thereto as follows:
>
> 'PLAINTIFF'S COUNSEL. I want to see whether any of the jury are connected with said insurance company. It now appears that one of the jurors is an agent of this very company, and I understand that this case is being defended by the Travelers' Insurance Company.
>
> 'DEFENDANT'S COUNSEL. I think the statement made by the counsel to the effect that he understands there is an insurance company interested in this case is prejudicial to the interests of the defendant in this action, and I

ask that the case be withdrawn from this jury, and sent to another for trial.

'The COURT. I will overrule your objection, and give you an exception.

'(Exception taken by defendant's counsel.)

'The COURT. Assuming that an insurance company is interested in this case, I think the plaintiff has a right to find that out.

'(Exception taken by defendant's counsel. The jury was then accepted and sworn.)'

"We are of the opinion that the statements made by the plaintiff's counsel and the court in the presence of the jurors impanelled to try the case were prejudicial to the defendant and constituted error, which requires a reversal of the judgment."

In the case of

Manigold v. Black River Co., 80 N. Y. Supp. 862,

the Court said:

"The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore,* 66 Hun. 630 (22 N. Y. Supp. 1119). *It is not proper to inform the jury of such fact in any manner.* It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly."

The case of

Lone Star etc. Co. v. Voith (Tex.), 84 S. W. 1100,

was reversed because of the persistent efforts of plaintiff's counsel, from the beginning to the close of his argument, to get before the jury the fact that the defendant was insured by such insurance company against loss by reason of plaintiff's injuries.

A similar case is that of

Coe v. Van Why, 33 Colo. 315; 80 Pac. 894.

See also:

Casselmon v. Dunfee, 172 N. Y. 507;

Barrett v. Bonham Oil Co. (Tex.), 57 S. W. 602;

Iverson v. McDonnell, 36 Wash. 73; 78 Pac. 202;

Sawyer v. Arnold Shoe Co., 90 Me. 369; 38 Atl. 333;

Waldrick v. Moore, 22 N. Y. Supp. 1119;

Gass etc. Co. v. Robertson (Ind.), 100 N. E. 689;

Van Buren v. Mountain Copper Co., 123 Fed. 61;

Roche v. Llewellyn Iron Works, 140 Cal. 574.

The case at bar comes squarely within these authorities. Mr. Cannon, most learned in the law, and, particularly, in the law of negligence cases, must have known that no evidence could be introduced on the trial for the purpose of showing that the defendant is indemnified against any judgment that plaintiff may obtain in this case, yet,

he forced the way to make a statement to that effect before the jury. Such information, so conveyed to the jury, could have had but one purpose,—the sinister purpose of prejudicing the jury against the defendant. The trial Judge, instead of promptly instructing the jury to disregard all the facts so stated by Mr. Cannon, declared that he would instruct "the jury to pay no attention to the remark of counsel, *unless it should appear to be a pertinent fact.*" This did not appear. The Judge did not "instruct the jury to pay no attention to the remark of counsel." The jury were left to conclude that the insurance was a fact and that that fact was pertinent to the case. The matter went to the jury with all the force and effect of evidence, emphasized by the objection and discussion, and stamped with the approval of the Court. The error is more glaring and prejudicial than those complained of in the cases above cited.

II.

THE FOURTH ASSIGNMENT OF ERROR.

After the jury was sworn to try this case, defendant by its counsel

> "moved the Court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint, to wit, one cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and

> the second in the same count on the theory that the defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action, and each of them being separate delicts".

The motion was denied. We have seen that the amended complaint charges the defendant with negligence in failing to furnish plaintiff with a safe place in which to do his work, and also in knowingly having in its employ an incompetent missed-hole man (Record, pp. 24, 25). These are distinct breaches of duty. As said in the case of

Donnelly v. San Francisco Bridge Co., 117 Cal. 423:

> "The master's duties to his employees are three: First, to supply them with suitable appliances for their labor; second, to afford them a reasonably safe place in which to perform their tasks; and, third, to use due care in the selection of fit and competent fellow employees."

A breach of any one of these duties constitutes a cause of action. A cause of action is held to be a union of the right of plaintiff and its infringement by the defendant.

1 Enc. Pl. & Pr., p. 116.

In actions for tort the test to be applied to determine whether there is more than one cause of action where damages have been inflicted by one wrongful act, is: Was the injury occasioned by an infringement of different rights? If it was,

there are as many rights of action as separate rights infringed. Supporting this rule in this State we have the case of

Baker v. Ry., 114 Cal. 501-509;

in other jurisdictions,

Laporte v. Cook, 20 R. I. 261;

McHugh v. St. Louis Transit Co., 190 Mo. 85; 88 S. W. Rep. 853; 40 Am. & Eng. Ry. Cas. 349;

2 Labatt Master and Servant, Sec. 861;

4 Labatt Master and Servant (2 Ed.), Sec. 1633,

in which text book, speaking of pleading, it is said:

> "A count is bad for duplicity where it alleges several distinct and independent breaches of duty. These allegations should each be made the subject of a separate count, if the plaintiff desires to rely thereon."

In the case of

Laporte v. Cook, above cited,

the court says:

> "The second count is bad for duplicity, in that it sets up several distinct and independent breaches of duty, viz: (1) Neglect to furnish proper safeguards for the protection of the plaintiff; (2) Neglect to give him suitable instructions; and (3) Neglect to provide proper persons to take charge of the work. These allegations should each be made the subject of a separate count, if the plaintiff desires to rely thereon. See *Steph. Pl.* (Heard) 251; *Gould Pl.,* 3 Ed. 219, Sec. 99, 419, Sec. 1."

In the case at bar the distinction between the two causes of action set out is obvious when we consider that the duty to furnish a reasonably safe place in which to work is a personal duty of the employer, which cannot be delegated in any manner to relieve him from responsibility for its negligent performance, the employer theoretically, at least, being liable for his own negligence, whereas, in the other case, the right to recover is predicated upon the negligence of a fellow-servant, the plaintiff being relieved against the defense of a fellow-servant's negligence on the ground that the employer was also at fault in employing the culpable fellow-servant.

The Code of Civil Procedure of the State of California, Sec. 430, Subd. 5, requires separate causes of action to be separately stated. A demurrer was filed in the case directed to this condition of the amended complaint (Record, p. 29). The demurrer should have been sustained. It was, however, overruled (Record, p. 32). In this situation, defendant's proper remedy was to make the motion under consideration.

Cheney v. Fisk, 22 How. Pr. (N. Y.) 238;
Otis v. Mechanics Bank, 35 Mo. 131;
Mooney v. Kennett, 19 Mo. 555;
Officld v. Wabash etc. Co., 22 Mo. App. 608;
Giacomo v. New York etc. R. Co., 196 Mass. 192; 81 N. E. 899;

of error, which is the refusal of the trial Court to instruct the jury to return a verdict for the defendant (Record, p. 169), and the fifty-fifth assignment of error, which is the ruling of the Court denying defendant's petition for a new trial (Record, p. 182).

The amended complaint, upon which plaintiff went to trial, charges in paragraph four that the defendant

> "failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid, and failed and neglected to provide a careful and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty it was to locate, mark and report to the oncoming shift unexploded charges of powder, and determine the safety of the place they were to work in, and particularly in this:"

Then follows a description of the place of the accident in which, it is stated, that the plaintiff and his brother, Frank, went to work under the orders and directions of the defendant to complete an unfinished hole in the face of the cross-cut,

> "and while so engaged the drill so operated by plaintiff and his driller ran into and exploded a charge of powder then and at all times theretofore unknown to the plaintiff or his driller, and of which the defendant was charged with knowledge and notice thereof, which knowledge or notice thereof defendant failed and neglected to communicate to plaintiff or his driller."

The fifth paragraph in part is as follows:

> "That the defendant then had in its employ, as heretofore alleged, a man designated as the 'missed-hole man', whose express duty is to examine the place where the oncoming shift is to work to ascertain its safety and is free from danger, and locate, mark and report to the oncoming shift all unexploded charges of powder, if any. That the defendant, though it had ample time and opportunity so to do, failed and neglected and did not use due care to mark or report to plaintiff's oncoming shift, said, or any unexploded charges of powder, and the defendant then and there carelessly and negligently performed its duty in that behalf, leaving plaintiff to believe that a proper examination of said place where plaintiff was directed to work as aforesaid, had been made and that the same was free from danger and safe to pursue the work of completing the unfinished hole he was ordered and directed to do. That the missed-hole man then in the defendant's employ whose duty it was to locate unexploded charges of powder and report as aforesaid, was careless and incompetent and known to be so by the company, the defendant company, and addicted to the drink habit."

After which follows a description of the injuries sustained by the plaintiff (Record, pp. 24, 25).

The allegations of negligence are denied in the answer (Record, pp. 34-36).

Under these pleadings the burden of proving the alleged negligence is on the plaintiff, and there is no presumption of negligence arising from the mere fact of the accident or death.

Sappenfield v. Railway, 91 Cal. 56;

Puckhaber v. Railway, 132 Cal. 364;

Patterson v. Railway, 147 Cal. 183;
Thompson v. Cal. Construction Co., 148 Cal. 40.

The defendant was not an insurer of plaintiff against accidental injury. Its obligation was to use ordinary care, and ordinary care in this connection means such care as prudent employers in the same line of business ordinarily use under the same circumstances.

Sappenfield v. Railway, 91 Cal. 56;
Brymer v. Southern Pacific Co., 90 Cal. 498;
Brett v. Frank & Co., 153 Cal. 272.

And, as indicated in the amended complaint, the defendant's negligence is to be measured by its knowledge or means of knowledge of the defect complained of.

Sappenfield v. Railway, 91 Cal. 57;
Brymer v. Southern Pacific Co., 90 Cal. 498.

If the defect was such as to deceive human judgment, in other words, if, by the exercise of the ordinary care above mentioned, the defendant did not, or could not, have discovered the defect complained of, then it is not liable.

Thompson v. Cal. Construction Co., 148 Cal. 39;
Malone v. Hawley, 46 Cal. 414.

The jury are not permitted to guess that defendant was negligent, or that it could,—through any of its officers,—have seen an unexploded blast

that the workmen themselves were unable to discover.

Puckhaber v. So. Pacific Co., 132 Cal. 366.

Yokum, the missed-shot man, was employed by the defendant as an extra precaution. Such a man is not ordinarily employed by mining companies under similar circumstances (Record, pp. 105, 107, 108, 111).

As is obvious, the best time to examine the face of the drift or cross-cut, for the purpose of discovering missed-shots, was after the muck had been removed, but the exigencies of mining sometimes required Yokum, the missed-shot man, to examine the face before the muck had been cleared away (Record, pp. 78 and 102). In such case he would examine as far down as possible, that is to say, as far down as the muck, but it was not his duty to clear away the muck and examine beneath it (Record, p. 79), it being clear from the evidence that it would be a physical impossibility for him to remove the muck in addition to his other duties (Record, p. 78).

In view of the incomplete examination that the missed-shot man was ordinarily enabled to make, it was the duty of the machine men to examine the face of the drift or cross-cut for missed-shots before setting up their machine and beginning drilling operations (Record, pp. 75, 76, 79, 95, 103, 104). There is some conflict in the testimony as to the duty of the machine men in this particular (Rec-

ord, pp. 112, 113). That the questions of fact arising from this state of the evidence were not properly submitted to the jury is one of the contentions of the defendant, which will receive attention later.

A missed-shot is ordinarily plain to be seen and can be detected without any trouble (Record, p. 75), but it is possible for the rock to so break that it would conceal a missed-shot "and that is why they come at times to miss discovering them, because they are concealed" (Record, p. 95).

Bearing in mind that missed-shots are ordinarily easy of detection, but that sometimes they are so concealed that they cannot be discovered, and bearing in mind the legal principle that it is the duty of every workman to exercise his faculties for self-protection,

Hightower v. Gray (Tex.), 83 S. W. 254-256;
Olson v. McMullen, 34 Minn. 94; 24 N. W. 318;
Crown v. Orr, 140 N. Y. 450; 35 N. E. 648;
Kenna v. Central Pacific, 101 Cal. 29;
Towne v. United Electric Co., 146 Cal. 770;
Russell Creek Coal Co. v. Wells, 96 Va. 416; 31 S. E. 614,

I shall now proceed to show that there is no proof in this case of the allegations contained in the second amended complaint that the missed-shot causing the accident complained of could have been discovered and known by the defendant by the use of ordinary care and diligence.

The witness Yokum testified that he examined the face of the cross-cut where the accident occurred after the first blast. His examination was from the top of the cross-cut down to the pile of muck, but he discovered no missed-shot. He did not know when the muck was removed and did not go back after its removal for the purpose of making further examination, because, he says, that was not his business, but the duty of the machine men (Record, pp. 98, 99, 102, 103, 104). The witness further says that he was at that place about half an hour before the accident. That Frank Whitsett was there alone, starting a hole, or lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. The witness helped him line up the machine. The witness did not look for missed-shots at that time, but he did not see any in the neighborhood of the place where the drill entered the face of the cross-cut. While there was muck there, it had been cleaned away "the best they could before they set up." He says: "I did not see any indication of a missed-hole in that vicinity" (Record, p. 103). He further states that it was more or less the duty of everyone in the mine to look for missed-shots; and

> "Q. I will ask you this—Did or did not every miner employed on those premises have to look out for missed-holes?
> A. Why, certainly" (Record, p. 104).

The witness Meyers, who was one of the two shift bosses in charge of the shift in which the

Whitsett brothers worked, testified that he was acquainted with the place where the accident happened, and that he directed the drilling machine to be set up there; that at that time the muck was pretty well cleaned up; that he could see the face tolerably well. That while he did not examine it carefully, he walked up and looked it over and could see no reason why they should not set up there. "I did not discover a missed-shot," he says (Record, p. 94). Again, he testifies: "When I told the Whitsett boys to set up their machine at this place, I did not see a missed-hole in this face, nothing to make me suspicious of anything like that * * * I looked at the face when I set these men up there, and saw nothing" (Record, p. 96). On the night of the accident this witness again visited the place where the Whitsett brothers were working shortly after the shift started (Record, p. 96), and while he does not say that he did not at that time discover a missed-shot, it is only logical to conclude from his testimony that, had he discovered one, he would have stopped the work. He further testified that it is a custom in mining for machine men to look for missed-holes and that they did in this mine. And he says: "That is a thing that is so thoroughly understood among miners, that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 95).

The witness Hall, who was the other shift boss, testified that he saw the place where the accident

happened, probably an hour before its occurrence, but that he did not at that time see a missed-shot in the face of the cross-cut (Record, p. 91).

The witness, Lawrence Whitsett, was at the place of the accident for five minutes after his two brothers had begun work there, but he saw no missed-shot (Record, p. 57). He knew the appearance of missed-shots, and he had previously discovered a number in this mine (Record, p. 52).

And the witness Wall testified to substantially the same facts. His work was within thirty feet of the place of the accident. He says he went to get a drink and coming back stopped to talk with the Whitsett boys and remained there probably five minutes. He noticed that the day shift had drilled about five holes, but he does not say that he saw a missed-shot (Record, pp. 59, 62).

The plaintiff testified that he and his brother reached the place of the accident when they went on shift, probably ten minutes after eight, but that they were obliged to wait for steel drills, and it was ten o'clock before they got the drill working. That when he first went to the place of the accident on that evening he remained probably five minutes, during which time he looked at the holes that had been drilled by the day shift, and saw those that had been previously drilled by his brother and himself. He then went for the drills, returning about ten o'clock, when he took out the old drill and put a new one

in the machine. In order to do this, he was obliged to stoop over and his face came within a foot of the face of the cross-cut and about eighteen inches from the ground, and he could see the face of the wall perfectly (Record, p. 71). He was in close proximity to the unexploded blast but did not see it.

While he states in one part of his testimony, that he did not know the appearance of a missed-shot, his entire evidence does not sustain this denial, as he says that he had assisted in loading dynamite into the holes at various times, and that on top of the dynamite they sometimes placed a little mud; that there was a cap and fuse, the latter sticking out of the hole. He, therefore, knew the appearance of a hole loaded and ready to blast, and he states that a missed-hole is a loaded hole that has not gone off; consequently, he must have known what a missed-shot looked like. Further he says that he knew that missed-shots sometimes occurred, and, finally, on cross-examination, he was asked:

> "Q. You have seen a missed-hole, of course?
> A. I don't remember whether I did or not.
> Q. You don't know whether you ever did or not?
> A. No, sir" (Record, pp. 70-72).

While there is a conflict in the testimony as to whether or not it was the duty of plaintiff, a chuck tender, to look for missed-shots, it is certain from his testimony that he did not discover

a missed-shot, or anything to excite his suspicions, at the place of the accident, and it is equally certain that he had a very good opportunity of discovering anything unusual or suspicious about his place of work.

Frank Whitsett remained at the place of the accident from ten minutes past eight until ten o'clock. We do not know how he occupied his time, except that the witness Yokum says that he was at the place about half an hour before the accident; that Frank Whitsett was there alone, starting a hole or lifter. Yokum helped him line up the machine. At that time the muck had been cleaned out (Record, p. 103). Frank was an experienced miner and is presumed to have known about missed-shots and their appearance. If there had been a missed-shot observable, it is certain that Frank would have seen it.

From all the testimony quoted, it is apparent that missed-shots are of two classes: First, those that are readily seen as soon as the muck is cleared away; and, second, those that are so hidden that they cannot be discovered by the exercise of any reasonable degree of care. It is further obvious that the missed-shot in this particular case belonged to the latter class, and that none of these witnesses were able to discover it. It does not appear from the evidence that any precaution, usually taken by miners in such cases, was omitted.

How, then, could the defendant, who must act through its employes, in the exercise of ordinary

care, have discovered a missed-shot that deceived so many?

If it was so hidden as to be undiscoverable by the exercise of ordinary care by those whose duty it was to discover the same, there can be no recovery, because the case is lacking in an essential element. It is, as we have seen, necessary for plaintiff to plead and prove that the defendant knew, or by the exercise of ordinary care could have known, of the unexploded blast causing the accident. This he did plead (Record, pp. 24 and 25), but this he did not prove.

In the case of

Malone v. Hawley, 46 Cal. 414,

the Supreme Court said:

> "The liability of the defendants depended upon three facts: First, that the method of attaching the hoisting rope to the cage was defective and unsafe, and the injury was caused to the plaintiff by the defect; second, *that the defendants knew, or ought to have known, of the defect;* and third, that the plaintiff did not know of it, and had not equal means of knowledge."

And so in the case of

Sterne v. Mariposa etc. Co., 153 Cal. 522,

the Supreme Court, in affirming the case of *Malone v. Hawley,* said:

> "It was essential to the existence of negligence on the part of the defendant in the matter, not only that the appliance was in fact not

a safe appliance for the work, but *also that the defendant, or its representative Maguire, knew, or ought in the exercise of reasonable care for the safety of its employes to have known, that the wrenches furnished were not safe and sufficient.*"

See also

Wright v. Pacific Coast Oil Co., 6 Cal. Unrep. 93;

Pacific Co. v. Johnson, 64 Fed. Rep. 958;

Bone v. Ophir etc. Co. (Cal. 1906), 86 Pac. 685;

Brunell v. Southern Pacific, 34 Ore. 256; 56 Pac. 129.

We have now to consider the alleged incompetency of Yokum and what effect the evidence relating thereto has on this branch of the case. There is evidence that Yokum drank "considerable" and that he was seen under the influence of liquor several times while on duty (Record, p. 52). Lawrence Whitsett states that he "saw Yokum drunk at the entrance to the mine. The last time was about two weeks before the accident" (Record, p. 57). The witness Wall testifies that he "saw Yokum under the influence of liquor about a week before the accident" (Record, p. 62), while the plaintiff says that he never saw Yokum intoxicated (Record, p. 72). The shift boss, Hall, states that

he had heard of Yokum drinking in the town of Kennett, ten miles away from the mine, and that on one occasion before the accident he had seen him drinking at the bunkhouse (Record, p. 92). But both Hall and Meyers, the two shift bosses, declare that they had never seen Yokum intoxicated while at work in the mine, and that at no time was there any complaint made about Yokum being incompetent through drinking, or any complaint made at all (Record, pp. 91, 96). Greninger states that he had never seen Yokum intoxicated, nor had any complaint ever been made to him about his being intoxicated (Record, p. 77).

If we concede for the purposes of argument, that Yokum, like many men of his class, sometimes drank to intoxication and that defendant knew, or ought to have known, of the fact, it is still insisted that plaintiff has not made out a case.

There is no evidence that Yokum drank to such an extent that his ability to do his work was impaired, nor is there any evidence that Yokum was intoxicated at the time he inspected the face in question, or at the time of the accident. He himself declares that when he inspected the face, he was sober (Record, p. 112), and this evidence is nowhere contradicted. No witness states that he was intoxicated within a week prior to the accident (Record, pp. 57, 60, 61, 62), and, as we have seen, there is no evidence that Yokum, by the exercise of ordinary care, could have discovered the con-

cealed missed-shot prior to the accident. In other words, there is no evidence that the accident was proximately due to any negligence or failure to exercise ordinary care on the part of Yokum.

Cosgrove v. Pitman, 103 Cal. 273.

It is the evidence that at the time Yokum inspected the face, the missed-shot was covered with muck (Record, p. 98). It was not his duty to remove the muck or examine beneath it (Record, pp. 98, 99). There is no evidence that Yokum omitted any precaution usually taken in such cases. When the muck was removed, it was the duty of Frank Whitsett, in any event, and,—by the testimony of some of the witnesses,—of the plaintiff, to examine the face for missed-shots (Record, pp. 75, 76, 78, 79, 95, 105, 106, 107 and 111).

If it be contended that there was no duty of inspection on the Whitsett brothers, plaintiff's case is not aided. There is no testimony to the effect that it was the duty of Yokum to go back, after the muck had been removed, and make a further inspection, nor is there any evidence that it was his duty, as suggested in the amended complaint, to mark or report to plaintiff's oncoming shift any unexploded charges of powder. But, supposing such was his duty, we have seen that the missed-shot was so concealed that it could not have been discovered by the exercise of ordinary care. Before plaintiff can recover, it is necessary for him to prove: First, that Yokum was incompetent, that

is to say, that he drank intoxicating liquors to such an extent that his ability to do his work was permanently impaired, or that he was intoxicated at the time he inspected the face in question; Second, that defendant knew, or ought to have known, that Yokum had become incompetent by reason of his habit of drinking intoxicating liquors; and Third, that had Yokum been competent, the missed-shot would have been discovered by him in the exercise of ordinary care.

In the absence of this proof plaintiff cannot recover, because the case would be entirely lacking in the element of negligence. If Yokum's ability had not been impaired by the habit of drink,—and there is no evidence that it had, and if he was sober at the time he inspected the face in question,—and the evidence is that he was,—there can be no recovery even though the missed-shot could have been discovered, because, in that case the accident would be due to the negligence of Yokum, a fellow-servant of the plaintiff. The authorities settle the law on the matters under discussion. The case of

Cosgrove v. Pitman, 103 Cal. 273,

is particularly in point. There the death of an employe was caused by the negligence of an engineer, a fellow-servant, who, it was alleged, was addicted to the habit of drinking intoxicating liquors, and that the defendants were negligent in retaining him in their employ by reason of being

chargeable with knowledge of this habit. One witness, when asked about the habits of the engineer

> "with respect to drink prior to the day of the accident, said: 'I have seen him take a drink once in a while. I have seen him when he was pretty full.' And, when asked how frequently, said: 'Well, not very often. It might be once a week, or something like that.' "

Other witnesses testified to other specific instances of intoxication, while the engineer himself stated that he was not intoxicated on the day of the accident and had not taken any intoxicating liquors for a year prior thereto. The Court says:

> "Unless the accident was in some way connected with such habit, or resulted from intemperance, the habit was not the cause of the negligence, and the defendants could not, by reason of their knowledge of this habit, be rendered liable for the negligence of Murphy resulting from any other cause. If the fact of Murphy's habit of intemperance at or about the time of the accident had been shown, the jury might have inferred that he was in that condition at the time of the accident, and that his negligence was the result of this condition. Proof of his being under the influence of liquor at the time of the accident would be presumptive of his negligence, and, if it had appeared by direct evidence that he had a habit of intemperance, *it would throw upon the defendants the burden of showing that he was not then in that condition.*"

In the Cosgrove case the engineer testified that he was not intoxicated on the day of the accident, and this testimony was uncontradicted (p. 272). In the case at bar Yokum testified that he was sober

when he examined the face in question, and that testimony is uncontradicted. In both cases, then, the defendant met the burden of proof by positive undisputed testimony.

Gier v. Los Angeles etc. Ry., 108 Cal. 130.

In

Harrington v. N. Y. Cent. R. Co., 19 N. Y. St. Rep. 20; 4 N. Y. Supp. 640,

plaintiff claimed that he was injured through the negligence of a fellow-servant, one Wienkaupf, who, it was alleged, was incompetent by reason of being addicted to the use of intoxicating liquors. The Court said:

> "There was no proof that Wienkaupf was incompetent or unfit for his position, unless rendered so by intoxication. We find no evidence to sustain the theory that his habits had in any way disqualified or unfitted him for the proper performance of the duties of his position when he was sober. Therefore, unless Wienkaupf was intoxicated on the morning of the accident, we do not perceive how the fact that he had been intoxicated upon the occasions mentioned in any way contributed to produce the plaintiff's injury. It is clear that his injury was not occasioned by the intoxication of Wienkaupf at other times. If Wienkaupf was sober on the morning of the accident, it must follow, we think, that the intoxication proved in no way contributed to plaintiff's injury, and hence, even if defendant was negligent in employing Wienkaupf because of his intemperate habits, still, as such negligence did not contribute to plaintiff's injury, it was not actionable, and cannot form a basis for the recovery in this action."

And see

Engelhardt v. Delaware etc. R. Co., 78 Hun. (N. Y.) 588;

Galveston etc. R. Co. v. Davis, 92 Tex. 372; 48 S. W. 570;

Zumwaldt v. Chicago etc. R. Co., 35 Mo. App. 661-664;

Langworthy v. Green Tp., 88 Mich. 207-217; 50 N. W. 130-133.

There is no evidence that Yokum was intoxicated at the time that he inspected the face, or that he could have discovered the missed-shot. No fact is proven from which the inference of negligence can be justly drawn. The jury were not entitled to infer negligence from a presumption that Yokum was under the influence of liquor when he examined the face, against his positive testimony that he was sober. A presumption must be based on a fact or facts, not on another presumption.

Puckhaber v. So. Pacific Co., 132 Cal. 366;
Cosgrove v. Pitman, 103 Cal. 273.

Plaintiff cannot recover for another reason: The duty that rested upon the defendant to provide a reasonably safe place in which deceased was to do his work, has well defined limitations, and the law relative to that subject, as applicable to the unquestioned facts in the case at bar, is settled by an al-

most unbroken current of authority. The master's duty to maintain a reasonably safe place of work is applied only where the place is permanent or *quasi* permanent, and it does not apply to such places as are constantly shifting or being transformed as a direct result of the employe's labor and where the work in its progress necessarily changes the character of the place for safety from moment to moment.

The case of

Consolidated Coal & Mining Co. v. Floyd, 51 Oh. St. 542; 25 L. R. A. 854,

is quite similar to that at bar. It was an action to recover damages for death. Clay, the deceased, was employed in mining coal and was killed by the falling upon him of a portion of the roof of the compartment in which he was at work. In the progress of the work it was the duty of a man, Dalton, to post and prop the roof of the mine. The Court says in its opinion:

> "It is insisted by the defendant in error that the duty of the defendant company in respect to furnishing a safe working place, was such that it was liable for the negligence of Dalton, irrespective of the question of his incompetency, and of the company's knowledge thereof, and the case was given to the jury by the learned judge of the common pleas upon this theory. Necessarily this view of the law proceeds upon the assumption that Clay and Dalton were not fellow servants, but that, as respects the posting and propping, Dalton was the *alter ego,* of the company, and hence the superior of Clay. The claim is sought to be sustained by a class of

cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated so as to absolve the master from liability in case of failure of the vice-principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance, or place, is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform."

(A number of cases being cited.)

In the case of

American Bridge Co. v. Seeds, 144 Fed. 605; 11 L. R. A. (N. S.) 1042,

plaintiff was employed in the work of removing an old railroad bridge and in constructing a new one across the Missouri River. In the course of his work he was struck by a piece of iron being hoisted with a fall and tackle, and knocked off the staging erected at the side of the bridge. In reversing a judgment in favor of the plaintiff, the Court, by Judge Sanborn, says:

"And, finally, the positive duty of the master does not extend to making or keeping a place

> reasonably safe, where the work is to make a reasonably safe place dangerous or an obviously dangerous place safe, as in blasting rock, tearing down structures, and removing superincumbent masses."

In the case of

Anderson v. Daly Mining Co., 16 Utah 28; 50 Pac. 819,

in which the plaintiff was injured by the explosion of a missed-shot, we find it stated that:

> "While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but in a place where the nature of the business is such that the conditions are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. * * * The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault."

The foregoing was quoted with approval in

Shaw v. New Year etc. Co., 31 Mont. 138; 77 Pac. 517,

in which case plaintiff was also injured by the explosion of a missed-shot.

See also

City of Minneapolis v. Lundin, 58 Fed. 529;
Finlayson v. Utica etc. Co., 67 Fed. 510;
Gulf etc. Co. v. Jackson, 65 Fed. 50;
Florence etc. Co. v. Whipps, 138 Fed. 13;
Moon Anchor etc. Mines v. Hopkins, 111 Fed. 303;
Fournier v. Pike, 128 Fed. 993;
Kreigh v. Westinghouse etc. Co., 152 Fed. 120;
Armour v. Hahn, 111 U. S. 313; 28 L. ed. 440;
Poorman etc. Co. v. Devling, 34 Colo. 37; 81 Pac. 252;
Heald v. Wallace, 109 Tenn. 346; 71 S. W. 84;
Holland v. Durham Coal Co., 131 Ga. 715; 63 S. E. 292;
Rolla v. McAlester Coal Co., 6 Ind. Ter. 410; 98 S. W. 141;
Thompson v. California Construction Co., 148 Cal. 39.

It follows, therefore, that under the facts shown by the evidence in this case, there was no duty on the part of the defendant to furnish the deceased with a reasonably safe place in which to do his work. There being no duty, there could be no breach thereof, and plaintiff has no cause of action upon which to base a judgment.

IV.

AS TO ERRORS NOS. 44 AND 45.

The trial Court was requested to charge the jury relative to the law last considered in the preceding point, but refused to do so, the requested charges being as follows:

> "I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses" (Record, p. 172).

And again in a modified form:

> "It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers" (Record, p. 173).

The refusal of the Court to charge the jury in accordance therewith, being assigned as Errors Nos.

44 and 45, respectively. And see Error fifty-third (Record, p. 181).

The argument made and cases cited in the last preceding point fully establish the correctness of the law as set forth in these requests and that the law is applicable to the facts shown by the evidence. The refusal to give the same, therefore, was palpable error.

V.

AS TO ERROR NO. XXVI.

For the reasons that have already been discussed, it was error for the trial judge to deny defendant's motion, made at the conclusion of plaintiff's case, to strike out the testimony relative to the incompetency of Yokum. The motion was as follows:

> "Defendant moves to strike out all the testimony in this case as to the incompetency of the man Yokum, and all of the testimony in the case as to his being intoxicated or seen intoxicated, on the ground that it is not shown in the case that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or the incompetency or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit or ever at any time overlooked a 'missed-hole'."

It is unnecessary to repeat the arguments already made in point III, concerning this error.

VI.

ERRORS XLIX, L AND LI.

The Court charged the jury in this cause as follows:

> "In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself" (Record, p. 179).

The defendant on its part had requested, but the Court refused, to charge the jury as follows:

> "If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said

> Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant" (Record, pp. 177, 178).

Defendant also requested, and the Court refused, to charge the jury as follows, to wit:

> "If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant" (Record, pp. 178, 179).

Exception was taken to the giving of the one charge which is assigned as Error No. fifty-one (LI), and to the refusal to give the others, which are assigned respectively as Errors Nos. forty-nine (XLIX) and fifty (L).

Aside from defendant's contention that no duty rested upon it to furnish deceased with a reasonably safe place in which to do his work, it was further

insisted that the employment of Yokum, the missed-shot man, was an extra precaution, and that such employment did not relieve the miners from their duty of looking for missed-holes, because the examination made by Yokum was frequently incomplete, for the reason that he could not look beneath the muck which he could not remove. This position of defendant was amply supported by evidence. Plaintiff on his part, however, contended otherwise, and there is some evidence in support of his theory. Under these circumstances, it was for the jury to determine, under proper instructions from the Court, what were the true facts, and whether or not, in view of the employment of Yokum, there still remained any duty on the part of Frank Whitsett or the plaintiff to look for and discover, if possible, missed-shots while the latter was employed in the defendant's mine.

The testimony relating to the subject is as follows: The witness Yokum stated that he was hired to bar down, and a day or two later the shift boss gave him orders to look out for missed-holes and shoot them when he could, otherwise, to have the machine men shoot them; that he had nothing to do with the muck that accumulated on the floor of the drift or cross-cut after a blast. It was his duty, he stated, to examine as far down as he could, which would be down to the muck; that it was not his duty to remove the muck (Record, pp. 98, 99, and 102); that after the muck was cleared away it was the business of the machine men to examine for missed-holes

(Record, pp. 102 and 103); that every miner employed by the defendant had to look out for missed-holes (Record, p. 103).

The witness Meyers testified that in every place where he had worked it was the custom for machine men to look out for missed-holes, and that they did so in defendant's mine, that some chuck-tenders looked for missed-holes and some did not. He says:

> "That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 95).

Greninger, the foreman, says:

> "It was the duty of all machine men to look for missed-holes, in order to protect themselves in cases where the missed-hole man was not, for any reason, able to find them, either being limited in time or from being covered with muck." He says also: "I do not consider that it was the duty of chuck-tenders to blast missed-holes, but it was the duty of each man in the mine to look for and avoid missed holes" (Record, p. 75).

The witness further testified:

> "Q. Then, what was the object of having a missed-hole man?
>
> A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set

> up when a machine had finished somewhere else.
>
> My idea in employing the missed-hole men was to protect the inexperienced men'' (Record, p. 79).

The witness Thomas testified that he never heard of the employment of a missed-hole man, except upon this occasion; that there is a custom among miners to examine for missed-holes (Record, p. 104). Pritchard testified to the same facts, and added that:

> ''The business of examining for missed-holes devolves on both the machine man and chuck tender'' (Record, p. 105).

And so the witness Davis testified that it is the custom for the miners—the two men at the drill—to look for unexploded blasts or missed-shots, and that it is not customary to place that duty upon a missed-shot man (Record, p. 107). And further, that if there is a missed-hole man employed in a mine, the duty would devolve on both him and the miners to look for missed-holes (Record, p. 110). So the witness Gowing says that it is the custom for the drill operator and chuck-tender to investigate or look for missed-shots (Record, p. 111).

On the contrary, Lawrence Whitsett testifies that in big mines he had never heard that it was the custom for the miner and chuck-tender to look out for and discover missed-holes (Record, p. 112). Yet, he says that at different times he discovered and reported missed-shots (Record, p. 52). And Enos Wall testifies in a similar strain (Record, p. 112).

With this conflict in the testimony, it was for the jury to determine the facts as to whether or not the employment of a missed-shot man entirely relieved the miners from their duty to look out for and discover missed-shots, and it was, consequently, error for the trial Judge to charge the jury, as matter of law, that in the event that the defendant provided an inspector, called a missed-hole man, then any driller or chuck-tender, regularly set at work at places inspected by such missed-hole man,

> "was entitled to assume that such inspector had done his duty in that regard and to act upon that assumption, and would not be guilty of negligence in failing to make such inspection himself" (see cases cited at the end of point III).

Under the charge as given, the jury were left uninformed as to the law to be applied in the event that they found that the employment of Yokum did not relieve Frank Whitsett and plaintiff from the duty of making an inspection for missed-shots. That the jury could very well have found such to be the facts, is evident from the volume of testimony introduced by the defendant in this connection. Proper instructions of the Court in a case of this character must embrace the subject from every angle. The jury should have been told that the defendant could lawfully place the duty of inspection on the shoulders of both Yokum and the Whitsett brothers. See Record, p. 141, for such an instruction. This was the theory of the defendant, and, there being evidence to support it, defendant

was entitled to have the same submitted to the jury under proper instructions.

People v. Taylor, 36 Cal. 265;
Davis v. Russell, 52 Cal. 615;
Buckley v. Silverberg, 113 Cal. 682;
Walsh et al. v. Tait, 142 Mich. 127; 105 N. W. 544;
Colgrove v. Pickett, 75 Neb. 440; 106 N. W. 453;
Hauber v. Leibold, 76 Neb. 706; 107 N. W. 1044.

If this is a proper subject for instructions under the evidence in the case at bar, the trial Judge could properly have told the jury in effect that if they found from the evidence that the employment of Yokum wholly relieved the plaintiff and also Frank Whitsett from the duty of looking for missed-shots, then and in that event, said plaintiff was entitled to assume that such inspector had done his duty in that regard and to act upon the assumption, and would not be guilty of negligence in failing to make such inspection himself, whereas, if, on the other hand, they found that the employment of Yokum did not relieve the plaintiff from such duty of inspection then any failure or neglect of plaintiff to make such an inspection on his own behalf would amount to such contributory negligence as would defeat his action, and that if no duty of inspection rested on plaintiff, but that such a duty did rest on Frank Whitsett, then, if the accident was proximately caused by his neglect in that behalf, plain-

tiff cannot recover because Frank Whitsett was a fellow-servant of plaintiff.

The error is apparent from another view point. The instruction given was based upon the theory that it was the absolute duty of the defendant to furnish Frank Whitsett with a reasonably safe place in which to do his work. We have seen, however, in point three (III) that this duty of the employer does not apply where the place of work is not permanent or, what may be termed, *quasi* permanent. Where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and where the employe has facilities equal to those of the employer for ascertaining the dangers in the place of work, the employe is under as much obligation as is his employer to be on the lookout for defects or dangers. Consequently, the rule requiring the employer to furnish a reasonably safe place of work is inapplicable. The facts of the case at bar bring it within the exception to the rule. See authorities cited in point three (III).

From the foregoing, we cannot escape the conclusion that it was error to give the charge complained of and error to refuse the charges requested.

VII.

AS TO ERROR No. XLVIII.

The trial Judge refused to charge the jury, at the request of the defendant, as follows:

"If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed-shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett" (Record, pp. 140, 141).

This is a correct statement of law, and defendant was entitled to have it given to the jury. The principles contained in this instruction were not given, even in substance, in the charge of the judge.

The evidence shows that Yokum was employed by defendant for the purpose of detecting missed-shots; it also shows that on several occasions he was seen intoxicated. There is, however, no evidence that his use of intoxicants was such as to affect his ability to do his work when sober. The

undisputed evidence is that he was sober at the time that he examined the face where the Whitsett brothers were injured (Record, p. 99). There is no evidence that he omitted any precaution usually taken by miners for the discovery of missed-shots, and there is no evidence that the accident complained of was proximately caused by Yokum's incompetency, or even by Yokum's negligence. On the contrary, as is shown elsewhere in this brief, the evidence is that the missed-shot was so concealed that it could not have been discovered by the exercise of ordinary care on the part of Yokum or any other of the defendant's employes.

The proposed instruction is, therefore, within the facts shown by the evidence and embraces defendant's theory of the case, and it should have been given by the trial judge as a correct exposition of the law applicable to the case.

Cosgrove v. Pitman, 103 Cal. 273;
Gier v. Los Angeles Etc. Ry., 108 Cal. 130;
Harrington v. N. Y. Cent. R. Co., 19 N. Y. St. Rep. 20; 4 N. Y. Supp. 640;
Engelhardt v. Delaware Etc. R. Co., 78 Hun. (N. Y.) 588;
Galveston Etc. R. Co. v. Davis, 92 Tex. 372; 48 S. W. 570;
Zumwaldt v. Chicago Etc. R. Co., 35 Mo. App. 664;
Langworthy v. Green Tp., 88 Mich. 217; 50 N. W. 133.

The proposed instruction above quoted contained the further paragraph:

> "If you should find from the evidence that Yokum was an incompetent employe employed by the defendant to detect missed-shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed-shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed-shot that caused the accident, and, failing in this particular, your verdict must be for the defendant" (Record, p. 141).

The argument made with reference to the preceding point six (VI) is applicable to that portion of the proposed instruction now under consideration. Taken together with those instructions which were refused by the Court and which are set forth as errors forty-nine (XLIX) and fifty (L), this proposed instruction rounds out fully defendant's theory of this branch of the case, and, being supported by evidence, it was error for the trial Judge to refuse the same.

See

People v. Taylor, 36 Cal. 265,

and other cases cited with it in point six (VI).

In an endeavor to protect its workmen, defendant employed Yokum. It was an unusual and extra precaution, one which it was not bound to take. It was an effort to safeguard the welfare of its employes, for which it should be commended, rather than condemned. Having done this, it would be a peculiar justice that could forge a purely humanitarian act into a weapon with which to smite the employer. Such justice could be based solely upon the idealistic theory that having gone a mile, it was defendant's duty to go two, and make plaintiff's work absolutely safe, regardless of his negligence or that of others. Such is not the law and never can be the law so long as actions of this character are governed by the principles of the law of negligence.

For the reasons herein contained, it is respectfully submitted that this Court correct the errors of the District Court by reversing the judgment complained of and directing a new trial herein.

Dated, San Francisco,
October 1, 1914.

C. H. Wilson,
Attorney for Plaintiff in Error.